BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD E. FLOWERS	)	
Claimant	)	
	)	
VS.	)	
	)	
PAYLESS SHOESOURCE	)	
Respondent	)	Docket No. 1,033,477
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the March 5, 2008 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on June 10, 2008.

APPEARANCES

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. James C. Wright, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that there is no dispute as to the extent of claimant's preexisting impairment to his left knee (20 percent to the lower extremity). And that if he sustained a new injury to the left knee on April 25, 2006 (as opposed to an injury that was the natural and probable result of his earlier accident) that his present impairment is, following the March 2007 knee replacement, a 50 impairment percent to the lower extremity. And that with credit for the preexisting impairment, the net result is 30 percent permanent partial impairment to the left lower extremity.

The parties also acknowledged that the only rating within the record as to claimant's alleged back injury is 5 percent permanent partial impairment to the whole body although

the causal connection between claimant's back complaints and his April 25, 2006 accident remains in dispute.

ISSUES

The claimant alleges an injury to his left knee and low back as a result of a trip and fall that occurred on April 25, 2006 while working his normal work duties. The ALJ concluded that claimant's back condition, while related to his accident, was not at maximum medical improvement and he therefore declined to award any permanency for that condition. The ALJ went on to rely on the opinions of the independent medical examiner who opined that claimant's April 25, 2006 accident accelerated claimant's need for the left knee replacement and was thus compensable. The ALJ then awarded claimant a limited period of temporary total disability (TTD) benefits, medical expenses associated with his accident and a 12 percent permanent partial impairment to the whole body, which reflects a conversion of the 30 percent impairment to the lower extremity. In doing so, the ALJ specifically held that the impairment to the knee was not a scheduled injury under K.S.A. 44-510d and therefore was to be computed as a whole body impairment under K.S.A. 44-510e(a).

The respondent requests review of this decision arguing that the claimant's knee injury did not give rise to his need for a knee replacement, nor for his subsequent low back complaints. Rather, those conditions were the natural and probable result of his earlier 2001 knee accident and resulting degenerative condition. In support of this contention, respondent points to the testimony and opinions of Dr. Kurt R. Knappenberger, the physician who performed claimant's knee replacement surgery. In addition, respondent maintains that claimant failed to provide an appropriate foundation for the medical bills associated with his care following his April 25, 2006 accident. Thus, respondent asks the Board to reverse the ALJ's Award and deny all benefits.

Claimant contends that when closely examined, Dr. Knapenberger's testimony only serves to bolster the ALJ's causation conclusions. And when coupled with the opinions of Dr. Danny M. Gurba, the independent medical examiner, and Dr. P. Brent Koprivica, a physician who examined and rated claimant's impairments, it is uncontroverted that claimant's objective condition and his subjective symptoms immediately after the accident necessitated his need for the knee replacement and ultimately gave rise to an altered gait and resulting low back complaints. Thus, the ALJ's Award should be affirmed as it relates to the respondent's responsibility for the knee replacement and modified to reflect a 5 percent whole body impairment for his low back complaints. Moreover, the Award should be modified to award claimant TTD for the period October 23, 2006 to April 24, 2007, less any periods respondent has already paid TTD benefits. Finally, the Award should be affirmed as to the medical bills incurred in connection with the April 25, 2006 accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury on April 25, 2006 when he tripped and fell walking near a forklift. He landed on his left knee and experienced a sudden onset of pain which required immediate medical attention. The most significant issue to be decided in this case is whether his subsequent need for a total left knee replacement is causally related to this fall or whether it is related to another earlier injury that occurred in 2001.

There is no dispute that in 2001 claimant sustained a torn meniscus in his left knee and required arthroscopic surgery. Following that surgery an infection developed and required lavage in another separate procedure. Those surgical procedures coupled with the underlying injury left claimant with a degenerative condition in his left knee. The parties agree that as a result of this injury, claimant was left with a 20 percent permanent partial impairment to the left knee.

It is significant to note that claimant was a large man. It is unclear how much he weighed in 2001, but in 2005 he weighed over 400 pounds. He sought weight reduction surgery but his private insurance carrier was not willing to provide that benefit. In connection with his efforts, claimant sought medical attention from a variety of doctors and one surgeon who performed gastric bypass surgery. These medical records make it clear that claimant was experiencing back pain and bilateral knee pain and arthritis. He told one nurse that he hoped to lose a great deal of weight and get his knees "replaced". Claimant's goal was to lose weight so that he could have a better quality of life, but also ensure that he could keep his job as a forklift driver for respondent. The larger he became, the more precarious his job security became.

Claimant testified that his back pain during this time (before April 25, 2006) was more widespread and not concentrated in his low back but in the cervical and mid-back areas. He explained that his pain was due to his sheer size.[1] He also admitted that during this same period of time he asked for certain accommodations at work so that he did not have to walk as far or to use the steps. Other than his consultations with respect to his weight loss efforts, claimant had no treatment for his back complaints or for his left knee from 2002 until 2006, when he fell at work.

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[1] This contention is borne out by the medical records as once claimant had the bariatric surgery, he lost over 200 pounds in rather short order and his back complaints went away, until 2007, when he says they began to surface after he started limping following his knee replacement surgery.

On April 25, 2006, claimant was walking around his forklift, tripped and fell, landing on his left knee. He was treated conservatively and eventually was referred to Dr. Knappenberger, the physician who treated claimant for his earlier knee injury in 2001.

Dr. Knappenberger is a board certified orthopaedist who first treated in May 2001 for left knee pain. Following conservative treatment he performed an arthroscopy and partial meniscectomy, repairing a tear on the medial side of claimant's knee.[2] Following the surgery claimant developed an intense infection that required a further surgical procedure. He was even compelled to have antibiotics constantly fed into his veins in an effort to combat the infection. Ultimately he was released from active treatment in March 2002, but Dr. Knappenberger explained to claimant that not only was his knee damaged from the tear, but the infection created further damage and that at some point in time, it was likely that he would require a knee replacement or a "more definitive procedure".[3]

Following claimant's April 25, 2006 accident, claimant returned to see Dr. Knappenberger. This first visit came on June 20, 2006. Dr. Knappenberger noted that claimant had been doing reasonably well with his knee as he had not sought further treatment between 2002 and 2006, and only then after his recent fall. There is even a reference to claimant engaging in some sports during this 4 year period of time. As of June 20, 2006, his diagnosis was degenerative joint disease of the left knee. Claimant was treated conservatively, with medications and injections, but his pain complaints did not subside. Eventually Dr. Knappenberger performed a diagnostic procedure, arthroscopically examining claimant's knee.

Beginning October 23, 2006, the date of the arthroscopic procedure, and until April 24, 2007, the date claimant was released to return to work, Dr. Knappenberger had claimant off work for his knee.

Based on this procedure, Dr. Knappenberger described a knee that was "completely worn out".[4] He said as of that exam it was clear claimant would need a new knee. But the two had discussed claimant's desire for weight loss surgery and they determined the best course of action was to allow claimant to undergo the gastric bypass surgery and then return for the knee replacement procedure.

The gastric bypass surgery was completed, with excellent result, and claimant had his knee replaced in March 2007. Dr. Knappenberger was "thrilled" with claimant's results from the surgery but things took a turn for the worse when a few days later he fell walking on some gravel. That subsequent fall required further treatment for his knee as Dr.

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[2] Knappenberger Depo. at 5.

[3] *Id.* at 8.

[4] *Id.* at 13.

Knappenberger was concerned that claimant was particularly susceptible to infection. His susceptibility continues but as of Dr. Knappenberger's deposition the infection was gone.

When questioned about the relationship between the April 25, 2006 fall and claimant's need for the knee replacement, Dr. Knappenberger initially indicated that -

> As you know, Mr. Flowers is undergoing a total knee replacement. Patient did have an injury on April 25, 2006. However, Mr. Flowers had pre-existing degenerative joint disease of the knees long before that injury. He did have aggravation of a pre-existing condition, but at some point in time even without the more recent injury, he was going to require total knee arthroplasty.[5]

When he was deposed, Dr. Knappenberger amplified on his opinion(s). He indicated it was very difficult to say which event gave rise to the need for claimant's 2007 knee replacement. He does acknowledge that a patient's need for a knee replacement is dependent on a patient's weight, activities and any reinjuries.[6] He also indicated that claimant's knee would not have looked any different even without the fall.[7] But the April 25, 2006 fall "probably did" contribute to his need for treatment. He acknowledged that claimant's knee continued to degenerate from 2002 to 2006, when he had the fall.

In July 2007, after claimant's gastric bypass surgery and his knee replacement surgery, he was evaluated by Dr. Koprivica at his attorney's request. As of this first examination, claimant's only complaints were to his left knee. He weighed 252 pounds, down nearly 200 pounds from his pre-surgery weight and he demonstrated no observable limp. Dr. Koprivica specifically asked claimant if he had any back complaints and claimant said "no".[8] Because claimant had only had surgery to his knee in March, Dr. Koprivica concluded claimant was not yet at maximum medical improvement (MMI). Approximately 2 months later Dr. Koprivica saw claimant again and noted claimant's limp and his low back and hip complaints along with the ongoing left knee problems. He rated claimant's low back condition at 5 percent impairment to the whole body (DRE II) and the knee at 50 percent impairment to the left lower extremity.

Dr. Koprivica had no difficulty attributing the low back complaints to the onset of claimant's altered gait following the knee replacement. He explained that an altered gait is a "medically plausible" development.[9] He also explained that the back complaints voiced

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[5] *Id.*, Ex. 5 (Feb. 21, 2007 letter).

[6] *Id.* at 8.

[7] *Id.* at 28.

[8] Koprivica Depo. at 28.

[9] *Id.* at 31.

in 2005 and early 2006 were as a result of the mechanical loading of claimant's 450 pounds on his body rather than as any sort of preexisting condition.

Like Dr. Knappenberger, Dr. Koprivica testified that the level of degeneration in claimant's knee, standing alone, would not be the single factor in determining claimant's need for a knee replacement. And there is no correlation between the level of degeneration and a patient's symptoms.[10] Put another way, a knee can be "bone on bone" but absent symptoms, no procedure would be warranted.[11] And according to Dr. Koprivica, it was the immediate onset of symptoms in April 25, 2006 that gave rise to the claimant's need for the knee replacement procedure.

When the parties could not agree on claimant's permanent partial impairment, the ALJ appointed Dr. Danny Gurba to perform an independent medical examination. That examination was performed on November 29, 2007. Following his examination, Dr. Gurba testified that claimant had a "bad" knee before the fall but after the fall, he needed a new knee.[12] He acknowledged claimant's excessive weight and that his weight would have a negative effect on his knee but that it was "hard to quantify" that effect.[13] Despite a rather rigorous cross examination, Dr. Gurba stood fast on his opinion that claimant's fall gave rise to the symptoms that, when coupled with this diagnostic findings of "bone on bone" led to the need for the knee replacement procedure. He assigned a 20 percent impairment to the lower extremity for this injury as well as a 5 percent impairment to the whole body for claimant's trachanteric tendonitis which he also attributed to claimant's fall and resulting altered gait.

The ALJ concluded that the April 25, 2006 accident "accelerated claimant's need for medical care to his left knee".[14] He went on to find that claimant also sustained a low back injury but that condition "has not been treated and is not at maximum medical improvement."[15] Thus, he declined to award any permanent partial impairment.

The ALJ also went on to conclude that the "knee" was not a scheduled injury under K.S.A. 44-510d and therefore, claimant's compensation should be calculated as if the knee impairment was a whole body injury under K.S.A. 44-510e(a). As the Board has noted in

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[10] *Id.* at 19.

[11] *Id.* at 19-20.

[12] Gurba Depo. at 26-27.

[13] *Id.* at 8.

[14] ALJ Award (Mar. 5, 2008) at 2.

[15] *Id.*

an earlier case,[16] this legal reasoning is contrary to the Supreme Court's most recent pronouncement in *Casco*.[17] Simply put, permanent partial impairments to the *knee* are to be calculated as impairments to the lower extremity and not as a whole body impairment.

Having said that, the Board is persuaded by the testimony of Drs. Koprivica and Gurba that claimant's need for his left knee replacement is causally related to his April 25, 2006 accident. While it is indeed true that claimant had a damaged knee before April 25, 2006, he was not symptomatic to the extent that he was immediately after his accident. He had been working at his normal work duties and did not seek out any medical treatment. And only after the fall in April 2006 did he require further medical attention. At that point his symptoms coincided with the fact that his knee had totally deteriorated and was "bone on bone". Only when both the symptoms and the objective findings occur was a knee replacement surgery warranted. Even Dr. Knappenberger, who was somewhat equivocal in his statements on this topic, agreed with that principle. He further agreed that the longer one can go without the replacement surgery, the better. And that is precisely what happened in this instance.

Like the ALJ, the Board concludes that claimant's need for a knee replacement is attributable to the work-related accident of April 25, 2006. He may have had a seriously deteriorated knee before April 25, 2006, but he did not have the symptoms that necessitated the surgery until after his April 25, 2006 accident. Thus, he is entitled to the surgery and the resulting permanency which the parties have agreed is 30 percent permanent partial impairment to the left lower extremity. While the ALJ's conclusion as to causation is affirmed his method of calculation is, however, modified to reflect a scheduled impairment rather than a whole body impairment.

The Board is also persuaded by the testimony of Drs. Gurba and Koprivica that claimant sustained a compensable injury to his low back as a result of his fall. Both physicians rated this at 5 percent to claimant's low back for his low back and hip complaints which they both attribute to his altered gait. As noted by Dr. Koprivica claimant's earlier complaints of pain in connection with his efforts at weight loss were attributable to his sheer weight and the load upon his skeleton. But by the time claimant was seen by Dr. Koprivica the first time, he had experienced a significant weight loss and had undergone knee surgery a few months before. And as he recovered, he developed an altered gait which, in turn, gave rise to low back and left hip problems. Dr. Koprivica described this as a reasonable and expected result given claimant's injury and the resulting knee replacement procedure. And even respondent concedes in its brief to the Board that

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[16] *Barbury v. Duckwall Alco Stores, Inc.*, No. 1,012,703, WL (Kan. WCAB June 16, 2008).

[17] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

claimant's increase in low back problems are more likely than not due to his knee replacement surgery.[18]

While the ALJ concluded that claimant was not at maximum medical improvement, the Board finds that is not the case based upon the physicians' opinions and their permanency ratings. And as a result, that aspect of the Award is modified to award claimant a 5 percent permanent partial impairment to the whole body. Thus, in addition to claimant's 30 percent permanent partial impairment to the left lower extremity, he is also awarded a 5 percent permanent partial impairment to the whole body. However, the Board must consider how these two ratings, one to a scheduled member and the other to the whole body, should be calculated for purposes of the Award.

In *Bryant*[19], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

Because claimant sustained injuries to her back, which is an unscheduled injury, all of her injuries, both scheduled and nonscheduled, are to be combined and compensated as a permanent partial disability under K.S.A. 44-510e.

A majority of the Board concludes that the claimant's knee and back impairments should be combined to reflect a whole body impairment. And based upon the physician's testimony, the Board finds that the lower extremity and the back impairments, when combined, translate to 15 percent to the whole body. Thus the claimant's Award is hereby modified to reflect a 15 percent permanent partial impairment to the whole body.

Finally, the Board finds that the ALJ's Award with respect to the TTD benefits should be modified. While the ALJ granted an additional 2.43 weeks of TTD benefits, the medical records support claimant's contention that he is entitled to TTD from October 23, 2006 up until his release on April 24, 2007. There does not seem to be any justification within the medical records to deny TTD benefits in the manner reflected in the Award. Thus, the Award is modified to reflect an award for TTD benefits from October 23, 2006 to April 24, 2007.

Likewise, although respondent objected to the medical bills itemized at the regular hearing and through claimant's testimony based on foundation, the Board is persuaded that the claimant's medical expenses associated with his knee injury, specifically including

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[18] Respondent's Brief at 17 (filed Apr. 11, 2008).

[19] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

the knee replacement surgery, are causally related to his injuries. Thus, they are to be paid by respondent subject to the statutory fee schedule.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated March 5, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 26.29 weeks of temporary total disability compensation at the rate of $448.30 per week or $11,785.81 followed by 60.56 weeks of permanent partial disability compensation at the rate of $448.30 per week or $27,149.05 for a 15 percent work disability, making a total award of $38,934.86.

As of July 1, 2008 there would be due and owing to the claimant 26.29 weeks of temporary total disability compensation at the rate of $448.30 per week in the sum of $11,785.81 plus 60.56 weeks of permanent partial disability compensation at the rate of $448.30 per week in the sum of $27,149.05 for a total due and owing of $38,934.86, which is ordered paid in one lump sum less amounts previously paid.

The medical bills itemized at the regular hearing are to be paid by respondent subject to the statutory fee schedule.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of July, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board members disagree with the majority's award of a 15 percent permanent partial general disability which combines claimant's scheduled injury to his knee with his general body disability. Instead, *Casco* requires separate awards of permanent partial disability compensation for each of the scheduled injuries under K.S.A. 44-510d and another for the general body disability under K.S.A. 44-510e.

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge